No. 6014

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. P. Brown,

Appellant,

vs.

W. J. Fitzgerald, Sheriff of the City and County of San Francisco, State of California, and W. A. Hamm, Sheriff of the County of Grays Harbor, State of Washington,

Appellees.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States for the Northern District of California denying the petition of H. P. Brown (appellant herein), for a writ of habeas corpus. (Trans. page 21.)

At the time of the filing of said petition for writ of habeas corpus (Trans. pages 3-6) appellant was being held and detained by appellees under executive warrant of the Governor of the State of California, for interstate rendition to the State of Washington.

The errors assigned on the appeal are set forth at pages 23 to 25 of the transcript and are as follows:

"1. The United States District Court for the Northern District of California, Southern Division, erred in denying the petition for a writ of habeas corpus.

2. That said District Court erred in denying the petition for writ of habeas corpus, respondents having failed to produce any warrant or authority whatsoever for the arrest and detention of petitioner.

3. That said District Court erred in denying the petition for writ of habeas corpus, respondents having failed to show cause why said writ should not be issued.

4. That said District Court erred in holding that petitioner was substantially charged with a crime under the laws of the State of Washington.

5. Said District Court erred in holding that the indictment under which petitioner is restrained and upon which the rendition warrant of the Governor of the State of California is based, substantially charged petitioner with a violation of Section 56 of the Washington State Banking Act.

6. Said District Court erred in holding that it did not have power or jurisdiction to examine into or determine whether said indictment substantially charges petitioner with a crime under the laws of the State of Washington.

7. Said District Court erred in holding that the prohibitions and penalties of the Washington State Banking Act, and particularly section 56 thereof, applies to persons other than the officers, directors and banking personnel of Banks and Bank Examiners.

8. Said District Court erred in holding that Section 56 of the Washington State Banking Act applied to or denounced or forbade the subscribing or exhibiting of any false papers other than false papers pertaining to the financial condition or affairs of a bank.

9. Said District Court erred in holding that it did not have power or jurisdiction to consider and determine the question whether Section 56 of the Washington State Banking Act was invalid and void and unconstitutional under the provisions of Article II, Section 19, of the Constitution of the State of Washington.

10. Said District Court erred in holding that Section 56 of the Washington State Banking Act is not in violation of and obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States of America.

11. Said District Court erred in holding that it did not have power and jurisdiction to determine whether said Section 56 of the Washington State Banking Act was invalid and void and in violation of and obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States.

12. Said District Court erred in refusing to issue a writ of habeas corpus pursuant to said petition."

To summarize briefly the points and issues raised by this appeal we may say, that appellant urged in the Court below, and urges in this Honorable Court:

1. That under the provisions of the Constitution of the United States, Article IV, Section 2, and under U. S. Revised Statutes, Sec. 5278, appellant cannot be lawfully arrested and detained for interstate rendition to the State of Washington unless he be first charged in the State of Washington "with treason, felony or other crime";

2. That appellant has not been charged in the State of Washington "with treason, felony or other crime."

ARGUMENT.

I.

UNDER THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES (Article IV, Section 2) AND UNDER THE U. S. REVISED STATUTES (Section 5278) APPELLANT CANNOT BE LAWFULLY ARRESTED AND DETAINED FOR INTERSTATE RENDITION TO THE STATE OF WASHINGTON UNLESS HE BE FIRST CHARGED IN THE STATE OF WASHINGTON "WITH TREASON, FELONY OR OTHER CRIME."

Proceedings for interstate extradition are governed by Section 2 of Article IV of the Federal Constitution, and the Federal Statutes (U. S. Rev. Stats. Sec. 5278).

Innes v. Tobin, 240 U. S. 127; 60 L. ed. 542;
In re Kopel, 148 Fed. 505;
Dey v. Kein, 2 Fed. (2nd) 966.

Section 2 of Article IV of the *Federal Constitution* is as follows:

> "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be remanded to the state having jurisdiction of the crime."

U. S. Revised Statutes, Sec. 5278, is as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from

> whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

Under the provisions of the Federal Constitution and statutes no person is subject to arrest and detention for interstate rendition unless two elements are present:

(1) He must be charged with treason, felony or other crime under the laws of the demanding state.

(2) He must have fled the justice of the demanding state.

U. S. Const., Art. IV, Sec. 2;
U. S. Rev. Stats., Sec. 5278;
Roberts v. Reilly, 116 U. S. 80; 29 L. ed. 544;
In re Straus, 126 Fed. 327.

In order to constitute a "charge" of crime within the meaning of the provisions of the Federal Constitution and statutes relating to interstate extradition, the accused must be *substantially* charged.

In the case of *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, at page 549, the Court said:

"It must appear therefore, to the Governor of the state to whom such a demand (extradition) is presented, before he can lawfully comply with it; *first* that the person demanded is *substantially* charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or affidavit * * * and *second* that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand.

The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, upon an application for a discharge under a writ of habeas corpus."

In the case of *In re Straus,* 126 Fed. 327, at 329, the second Circuit Court of Appeals said that two conditions precedent are necessary to the issuance of the governor's warrant:

"First that the appellant was substantially charged with crime against the laws of Ohio, and second that he was a fugitive from the justice of that state; the first is a question of law, the second is a question of fact. Roberts v. Reilly, 116 U. S. 80, 29 L. ed. 544; Hyatt v. Cockran, 188 U. S. 691, 47 L. ed. 657."

In the case of *Hyatt v. New York,* 188 U. S. 691, 47 L. ed. 557, at pages 660, 661, the Supreme Court said:

"Certain facts, however, must appear before the governor has the right to issue his warrant. As was said in Roberts v. Reilly, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291, 300, it must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is *substantially* charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the per-

son demanded is a fugitive from the justice of the state the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded was substantially charged with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; * * *"

In *Ex parte Dennison,* 101 N. W. 1045 (Nebr., 1904), the Supreme Court of Nebraska held that when accused is in custody under a governor's warrant he should be released upon a writ of habeas corpus if he establishes that—

> "he is not substantially charged with a crime against the laws of the state from whose justice it is alleged that he has fled, by an indictment or affidavit properly certified, or that he is not a fugitive from justice from the state demanding him."

Scott and Roe (Text) *on Habeas Corpus* (1923), at p. 391 say:

> "The question whether the act is a crime against the law of the demanding state is a proper subject of inquiry."

While both the Federal and the state Courts are all in agreement that the person demanded must be "substantially charged with a crime under the law of the demanding state," the attitude and expression of the Supreme Court of the State of Washington, the demanding state in the case at bar, is particularly interesting and instructive on the point.

Armstrong v. Van De Vanter, 59 Pac. 510 (Wash.) (syllabus):

> "On habeas corpus on requisition of a fugitive from justice from another state it is the duty of the court to determine whether the indictment on which the requisition was based sufficiently charges a crime against the laws of the foreign state."

The Washington Supreme Court, in a carefully considered and well rendered opinion in the above case said, at page 513:

> "'It would be a dangerous precedent if it should be held that a man could be deprived of his liberty, and removed to another state, upon an accusation so vague and unsatisfactory as is contained in the affidavits in this case. It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the state will meet the full measure of its obligation under the federal constitution if it requires this before consenting to the arrest and removal of alleged offenders.' It seems to us that the reasoning in this case is unanswerable, and, even if the authorities were conflicting, we should be inclined to follow it. Equally plain and convincing is the following language used by the court in Re Terrell (C. C.), 51 Fed. 213, to wit: 'There is good cause for holding that this power should be exercised liberally whenever the judge before whom the questions are raised on application for a warrant of removal or on habeas corpus is satisfied from the face of the indictment that, were such an indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses, committed, perhaps, in some place he had never visited he were removable to a district thousands of miles from his home, to

answer to an indictment fatally defective on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the court before which comes the question of removal from passing upon them, when it has no doubt as to how it would pass upon them if the cause were pending before it.' To the same effect is Ex parte Hart, 11 C. C. A. 165, 63 Fed. 249. This is a case from this state where requisition was made on the governor of Maryland. This case also disposes of the question of the sufficiency of the affidavit by a private individual. The court, in concluding its remarks, says: 'The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to. The act of the governor can be reviewed, and, if he has not followed the directions and observed the conditions of the constitution and laws of the United States pertinent to such matters, can be set aside as void.' It is evident that he has not followed the laws of the United States if the record does not show that the party demanded has committed a crime. In any event, the party demanded may be, and frequently is, a bona fide resident and citizen of the state upon which the requisition is made; and to hold that such party should be discriminated against in the administration of criminal law, and should be deprived of the rights and privileges under the law which are accorded to other citizens charged with crime, is not in keeping with the spirit of our law or the genius of our government, and would unnecessarily tend to a subversion of personal liberty.

The conclusion reached that the court has a right to inquire into the sufficiency of the indictment brings us to the investigation of questions

> affecting the substance of the extradition proceedings and the validity of the complaint upon which the indictment was founded * * *. A pertinent question, then, is, is the defendant here legally charged with the commission of a crime under the laws of the state of Illinois by the indictment which is made a part of the record? We think this question must be answered in the negative."

The foregoing cases definitely establishing, as they do, that appellant's arrest and detention are unlawful unless the indictment *substantially* charges him with a crime under or against the laws of Washington, it becomes necessary to determine whether the indictment in the case at bar "substantially" charges appellant with a crime.

II.

APPELLANT HAS NOT BEEN CHARGED IN THE STATE OF WASHINGTON WITH TREASON, FELONY OR OTHER CRIME.

The second point raised by the appeal, to-wit: that appellant has not been "charged" in the State of Washington "with treason, felony or other crime" is rested upon various distinct and independent grounds as specified in the assignment of errors.

The alleged indictment which was the basis for the issuance of the governor's rendition warrant and the consequent arrest and detention of appellant is set forth in full at pages 6 to 15 of the transcript. Said alleged indictment attempts or pretends to accuse appellant of violation of Section 56 of the Washington State Banking Act (*Washington Laws 1917,*

Chapter 80, pages 271 to 308), the title of said Act being:

> "An act relating to banking and trust business; the organization, regulation, management and dissolution of banks and trust companies, providing penalties and repealing certain acts and declaring an emergency."

Section 56 of the Washington State Banking Act is as follows:

> "Every person who shall knowingly subscribe to or make or cause to be made any false statement or false entry in the books of any bank or trust company or shall knowingly subscribe to or exhibit any false or fictitious paper or security, instrument or paper, with the intent to deceive any person authorized to examine into the affairs of any bank or trust company or shall make, state or publish any false statement of the amount of the assets or liabilities of any bank or trust company shall be guilty of a felony." (Washington Laws 1917, page 299.)

Appellant respectfully urges that the alleged indictment (Trans. pages 6-15) fails to charge appellant with a crime in the State of Washington, for the following reasons:

(1) Because the provisions and penalties of the Washington State Banking Act, under which the alleged indictment is found, apply only to members of a certain "class," and the indictment does not allege that appellant was a member of that "class";

(2) Because the "false or fictitious paper or security, instrument or paper" denounced by Section 56 of the Washington State Banking Act includes only such "paper" as is false or fictitious as to the

financial condition of a bank, or as to matters affecting the financial condition of a bank, whereas, the indictment not only fails to show that the "paper" therein referred to in any wise related to or affected the financial condition or affairs *of a bank,* but on the contrary the indictment shows affirmatively that the "paper" in question pertains solely and exclusively to the financial condition and affairs of appellant and of various corporations who were in no wise connected with a bank;

(3) Because Section 56 of the Washington State Banking Act under which appellant is sought to be charged is invalid and void, and is in violation and obnoxious to the provisions of Article II, Section 19, of the Constitution of the State of Washington;

(4) Because Section 56 of the Washington State Banking Act under which appellant is sought to be charged is invalid and void, and is in violation of and obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States.

The foregoing points will be presented in the order indicated.

(A) Appellant is Not Charged With a Crime in the State of Washington Because the Provisions and Penalties of the Washington State Banking Act Apply Only to Members of a Certain "Class" and the Indictment Does Not Allege That Appellant Was a Member of That "Class."

The State of Washington, by the indictment (a copy of which is set forth at pages 6-15 of the Transcript) seeks to charge petitioner with violation of the Washington State Banking Act, and particularly with violation of Section 56 of that act.

The title of the act, and section 56 of the act are set forth at page 11 of this brief, and the Washington Laws, 1917, containing the whole of the act are submitted herewith in order that the Court may conveniently review the whole of the act.

The State Banking Act, both by its title, and by the context of the whole act, clearly and conclusively shows that it is "an act relating to banking and trust companies" and having to do *only* with "the organization, regulation, management and dissolution of banks and trust companies."

Sections 1 to 13, inclusive, provide for the appointment of a state bank examiner, his qualifications, powers, duties, etc., with respect to banks and trust companies.

Section 14 contains definitions.

Sections 15 to 18 inclusive, except national banks from the act.

Section 17, provides that trust departments of National Banks shall be subject to the act.

Sections 18 to 23 inclusive, provide for the organization, incorporation, corporate powers and duties of banks.

Sections 24 and 25 provide for the corporate powers and duties of trust companies.

Sections 26 to 29 inclusive, provide for increase and reduction of the capital stock of banks and trust companies, extension of time of existence, amending the articles, and reorganization, etc.

Sections 30 to 35 relate to the management of banks and trust companies, election of directors, directors

and stockholders' meetings, bonding of officers and employees, dividends, assessments, stockholders' liability.

Sections 36 and 37 limit the powers of banks and trust companies to purchase of its own, or other bank stock, and as to the purchase of real estate.

Sections 38 and 39 relate to savings banks business.

Sections 40 and 41 relate to foreign corporations and foreign bank branches.

Sections 42 to 45 relate to the payment of deposits.

Sections 46 and 47 relate to cash reserves and bad debts.

Section 48 relates to legal investments for trust companies.

Sections 49 and 50 relate to the conduct of trust companies.

Sections 51 to 53 relate to loans.

Section 54 relates to the pledging and rediscounting of the banks securities.

Section 55 relates to prohibiting preferential transfers by insolvent banks.

Section 56 relates to prohibiting false entries in the books, deception of examiners, and false statements or entries as to assets.

Section 57 relates to prohibiting mutilation or secretion of bank books and papers.

Section 58 relates to rules for bank examinations and reports to bank examiner.

Sections 59 to 73 relate to empowering state bank examiner to take possession of a bank, and providing

for the handling, liquidation and winding up under his supervision.

Sections 74 and 75 provide for voluntary liquidation of banks and trust companies.

Sections 76 and 77 prevent the act from being retroactive.

Sections 78 and 79 relate to banks engaged in business at the time of the adoption of the act (1917).

Section 80 provides blanket penalty provisions.

Section 81 provides penalty for receipt of deposits by insolvent bank.

Section 82 repeals the existing state bank act.

Section 83 declares an emergency.

It will be noted that the whole act, whether taken in its entirety, or taken section by section, pertains solely and exclusively to "The organization, regulation, management and dissolution *of banks and trust companies.*"

It does not in any wise pertain to, or regulate, the conduct or business of any person other than banks and trust companies, their personnel, and the Bank Examiner and his deputies.

Applying the usual and well known rules of construction, it is apparent that the act was not intended to, and it does not attempt to, regulate the conduct of, nor provide penalties to be applied to persons not connected with banks. It is restricted in its application to banks and trust companies, including the officers, agents and employees thereof, and to the Bank Examiner and his staff.

The act, and every part of it, applying *only* to a restricted class of persons (banking personnel and bank examiners), no person other than a member of that class is subject to the prohibitions and penalties of the act.

Consequently, it is an essential element to the violation of the act, that the person charged be a member of the "class" which is subject to the prohibitions and penalties of the act.

It is an elementary principle that in all cases where the provisions of a penal statute or section apply only to persons of a certain class (regardless of how large or how small that class may be * * * and even though the class be as large as the selective service registration during the war) it is an *essential element* of the crime that the prohibited acts be committed *by a person within the class.*

It is also elementary that where a statute or section applies only to a certain "class" of persons, an indictment thereunder does not "charge a crime" unless it shows by direct averment that the accused is a member of the "class."

Obviously, an indictment which fails to show that accused was a member of the "class" fails to charge an *essential element* of the crime and consequently does not "charge a crime" under the statute.

The case of *Ex parte Taylor*, 238 Pac. 235, holds:

> "Any information which omits an essential element of an offense sought to be charged is fatally defective, and the prisoner may be released on habeas corpus."

Appellant in the case at bar *never was, and is not now, a member of the "class"* to which the provisions and penalties of the State Banking Act apply. Appellant was in no wise connected or associated with any bank or trust company. Consequently, he can not be *charged with a violation* of the act.

Further, the indictment before the Court does not allege, nor does it attempt to allege, either by direct averment as required by law, nor even by conclusion of law, that appellant ever was, or now is, a member of the "class."

Although the State Banking Act applies only to the persons within the above mentioned class, the State of Washington seeks to strain and stretch the act, and particularly the words "every person" appearing in Section 56 of the act, to include appellant, who is not now, and never was, subject to the provisions and penalties of the act.

The law on this point, however, has been firmly fixed and established by the Courts.

In the case of *United States v. Jin Fuey Moy,* 225 Fed. 1003, the U. S. District Court, in construing the words "any person" used in Section 8 of the Narcotic Act, and in determining whether the indictment charged defendant with a crime, said (p. 1005):

> "In reading the eighth section in connection with the remaining sections of the act of Congress, when it provides that it shall be unlawful for any person not registered under the provisions of this act to have in his possession certain drugs, *I think that the word 'person' should be held to refer to the persons with whom the act of Congress is dealing;* that is, the persons who are

required to register and pay the special tax in order to import, produce, manufacture, deal in, dispense, sell, or distribute. *And there is no allegation in the indictment that Martin had in his possession these drugs for any of these purposes.*

The indictment, therefore, could not be sustained, unless the mere fact of having the drugs in his possession is a violation of the law. If so, *any person* would be presumptively guilty and subject to indictment, and having the burden of proof cast upon him under this section, if he had any small amount of the prescribed drug in his possession, without any reference to the purpose for which it was to be used, whether legitimate or otherwise.

On account of the view which the court entertains as to the scope of the act of Congress, the motion to quash the indictment is sustained, and a general exception is noted to the government, and they will be given any special exception that may be desired."

The *Jin Fuey Moy* case was affirmed by the United States Supreme Court.

U. S. v. Jin Fuey Moy, 60 L. ed. 392.

Mr. Justice Holmes in the opinion (at page 1064) said:

"The district judge considered that the act was a revenue act, and that the general words, 'any person,' must be confined to the class of persons with whom the act previously had been purporting to deal. The government, on the other hand, contends that this act was passed with two others in order to carry out the international opium convention (39 Stat. at L. 1929); that Congress gave it the appearance of a taxing measure in order to give it a coating of constitutionality, but that it really was a police measure that strained all the powers of the legislature,

> and *that sec. 8 means all that it says, taking its words in their plain, literal sense.*
>
> *A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.* United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 408, 53 L. ed. 836, 849, 29 Sup. Ct. Rep. 527.
>
> Approaching the issue from this point of view we conclude that 'any person not registered' in sec. 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which *the statute undertakes to deal*—the persons who are required to register by sec. 1."

In the case of *Johnson v. U. S.*, 294 Fed. 753, the Ninth Circuit Court of Appeals in deciding the case held that where there are a number of elements in the crime, one of them being that the act applies only to a certain "class" of persons, that the indictment must contain direct averments as to each of the essential elements, and that the indictment does not *charge a crime* unless it shows on its face that the accused belongs to the "class."

The Court (Gilbert, Hunt, Rudkin) in its opinion by Judge Rudkin, at page 756, said:

> "* * * that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law; for example, it would not be sufficient, in an indictment for illegal voting, to charge that the defendant was not a qualified voter, without setting forth the grounds of disqualification. Quinn v. State, 35 Ind. 485, 9 A. Rep. 754. So in a prosecution for failure to register under the Selective Service

> Act (Comp. St. secs. 2044a-2044k) we apprehend it would not be sufficient to charge that the defendant was required to register. The indictment or information should go further, and show that he was one of the particular class mentioned in the statute."

In the *Johnson* case, above quoted, the indictment did not charge a crime even though it alleged (not by direct averment but by *conclusion of law*) that defendant was a member of the "class."

In the indictment under consideration in the case at bar there is no allegation, even by conclusion of law that appellant was a member of the "class" controlled by the Washington State Banking Act.

In the case of *Morris v. United States,* 168 Fed. 682 at 683 et seq., the Court (8th C. C. A.) in its opinion said:

> "The defect now claimed is that the count does not disclose that the defendant was either a manufacturer, or dealer in oleomargarine, and it is claimed that section 6 of the act of 1886, supra, denounces offenses against manufacturers and dealers only. The section reads as follows:
>
> > 'That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, * * * and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages. * * * Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above

described or who packs in any package any oleomargarine in any manner contrary to law * * * shall be imprisoned not more than two years.'

A careful analysis of the fore part of the section discloses that certain obligations or duties are imposed upon manufacturers and wholesale and retail dealers in oleomargarine. Manufacturers are required to pack their product in a certain way, and retail dealers are required to pack and sell the product in the way prescribed by it for them. So far the section does not concern any other person or class of persons. The user or consumer is not mentioned. Immediately following this particular enumeration of those upon whom duties are imposed comes the denunciation of offenses:

'Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine,' etc.

These words are clearly applicable to a manufacturer or dealer and inapplicable to any others. Then follow in the disjunctive the words constituting the offense charged in the eighth count, 'or who packs in any package any oleomargarine in any manner contrary to law.' This last clause, commencing with the words 'every person' considered by itself alone, is comprehensive enough, and is claimed by learned counsel for the government in the case to include any and every person, whether he be a manufacturer, wholesale or retail dealer, the housewife who may desire for her own convenience to repack the oleomargarine after purchasing it into other more convenient vessels or packages for preserving it at home, or any other person who may have anything to do with it. But this, we think, does not express the legislative intent manifest by the entire section. The 'manufacturer' and the 'dealer' afford the subject-matter of the section. They are the only persons upon whom the duty of packing in the

manner required by the act is imposed, and for that reason would naturally and reasonably be the only persons against whom the penalty would be imposed for violating that duty by packing in some other way.

Congress, in the absence of a clearly manifested contrary intent, must be presumed to have contemplated this ordinary and reasonable construction—the one in harmony with the subject of legislation, rather than the other unnatural and discordant one. In Market Co. v. Hoffman, 101 U. S. 112, 116, 25 L. ed. 782, it was said:

> 'To understand the true meaning of the clause, it is necessary to observe what the subject was in regard to which Congress attempted to legislate. In Brewer's Lessee v. Blougher, 14 Pet. 78, 10 L. Ed. 408, it was said to be the undoubted duty of the court to ascertain the meaning of the Legislature from words used in the statute and the subject-matter to which it relates.'

In Petri v. Commercial Bank, 142 U. S. 644, 650, 12 Sup Ct. 325, 326, 35 L. Ed. 1144, it was said:

> 'The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled.'

In United States v. Freight Association, 166 U. S. 290, 320, 17 Sup. Ct. 540, 41 L. Ed. 1007, it was said:

> 'While it is the duty of courts to ascertain the meaning of the Legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so in order to carry out the legislative intent.'

In harmony with the foregoing observations and authorities, we are of opinion that the words 'every person,' found in the act of 1886, are re-

ferable solely to the manufacturers and wholesale and retail dealers just before them mentioned and whose business afforded the subject-matter of the legislation. The indictment in this case, therefore, to be good as a *matter of substance,* should have contained an averment that the accused was either a manufacturer or a dealer in olemargarine, and as such packed the product in a manner violative of the act. There is a total lack of such averment either in direct language or by reference to other counts, and for that reason the eighth count *fails to state facts which constitute an offense.*"

CHARGING IN THE WORDS OF THE STATUTE IS NOT SUFFICIENT.

Respondents, however, contend that they have charged the petitioner in the words of section 56, and that that is sufficient.

However, even if we should disregard the decisions of the U. S. Supreme Court, the inferior Federal Courts and the various State Courts (including the Washington Courts), and measure this indictment solely by the Washington statutes, still, it does not "charge a crime."

Section 2055, *Remington Comp. Stats.* (Wash.), is as follows:

> The indictment or information must contain—
>
> 1. The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties.
>
> 2. A statement of the *acts constituting the offense,* in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

Section 2057, *Remington Comp. Stats.* (Wash.), is as follows:

> The indictment or information must be direct and certain as it regards—
>
> 1. The party charged;
>
> 2. The crime charged;
>
> 3. *The particular circumstances of the crime charged when they are necessary to constitute a complete crime.*

In the case of *State v. Hall,* 102 Pac. 888 (Wash.): The question in the case was whether the information charged a crime. Defendant was charged in the words of the statute. Defendant contended that the charge was insufficient unless it charged all the elements of the crime, including those elements necessarily implied by the statute. The state contended that a charge in the words of the statute was sufficient. The Court held that the information did not charge a crime. The Court, in its opinion (by Judge Rudkin), said (page 888):

> "The sufficiency of the information is the only question presented for the consideration of this court. The appellant contends that the information is defective because it failed to allege that the property taken was in the possession of the prosecuting witness at the time of the alleged robbery. The respondent, on the other hand, contends that the information is in the language of the statute and is therefore sufficient, citing many cases to sustain that well-established general rule. There are *many exceptions,* however, to that general rule, and this court has held that the crime of robbery and the crime of larceny from the person fall within the exceptions, and not within the general rule. State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Morgan, 31 Wash. 226, 71 Pac. 723. In the Dengel case it was said that the

defendant might have committed every act charged in the information, and yet not be guilty of the crime of robbery, because ownership of the property taken was not alleged in some person other than the defendant. In the case at bar the information does not allege title to the property in a person other than the appellant, but title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken. The information simply charged that the property of the Spokane Merchants' Association of Spokane was taken by the appellant from the immediate presence of G. E. Parsons. As we understand the law, to constitute the crime of robbery, the property must be taken from the person of the owner, or from his immediate presence, or from some person, or from the immediate presence of some person, having control and dominion over it. For instance, if A. takes the property of B. from the immediate presence of C. by forcing or putting in fear, A. is not guilty of the crime of robbery unless B. had control and dominion over C.'s property at the time of the taking. For this reason the information is in our opinion defective. and will not support a conviction. It was so held in People v. Ho Sing, 6 Cal. App. 752, 93 Pac. 204. The California Statute there construed defines the crime of robbery as 'the feloniously taking of personal property in the possession of another, from his person or immediate presence and against his will accompanied by means of force or fear.' Our statute does not contain the words 'in the possession of another', but we think that control and dominion over the property taken in the person from whom or from whose presence the property is actually taken are necessarily implied."

In the case of *State v. Carey*, 30 Pac. 729, at 731 (Wash.) the Court held that charging an offense in the words of the statute is not sufficient unless the statute defines the offense, specifying all the elements.

Again, as late as February, 1929, in the case of *Kubo v. United States,* 31 Fed. (2nd) 88, the Ninth Circuit Court of Appeals (opinion by Judge Rudkin) held:

> "As a general rule, no doubt, it is sufficient to charge a statutory crime in the words of the statute; but this is only true where the words in themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. United States v. Carll, 105 U. S. 611; 26 L. Ed. 1135."

See also *U. S. v. Bopp,* 230 Fed. 723.

In the case at bar, Section 56 of the State Banking Act does not set forth all the elements necessary to constitute the offense intended to be punished. It does not set forth directly and expressly that the offender, to be punishable, must be an officer, agent or employee of a bank, viz.: within the "class." Further, it does not set forth that the "false paper" denounced by Section 56 must be false as to the financial condition, or as to matters affecting the financial condition of a bank.

> (Note. The point that it is an essential element of the offense that the "paper" be false as to the financial condition of a bank, or as to matters affecting the financial condition of a bank is discussed hereinafter.)

It follows that inasmuch as the words of Section 56 do not in themselves "directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense" (*Kubo v. United States* quoted above), that the indictment

charging in the words of Section 56 *does not charge petitioner with a crime.*

The Washington Courts, in common with all other Courts, also hold that if defendant might have committed every act charged in the indictment, and yet not be guilty of a crime, the indictment does not *charge a crime.*

In the case of *State v. Hall,* 102 Pac. 888, Judge Rudkin said:

> "In the Dengel case it was said that the defendant might have committed every act charged in the information, and yet not be guilty of the crime of robbery, because ownership of the property taken was not alleged in some person other than the defendant. In the case at bar the information does allege title to the property in a person other than the appellant, but title was not alleged in the person robbed, nor is any connection shown or alleged between the person robbed and the property taken."

In the case of *People v. Allison,* 25 Cal. App. 746, at 748 the Court said:

> "It follows that the facts stated in the indictment might be true and yet the defendant be innocent of any crime. While an indictment will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, then it is *insufficient in charging the offense.* The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged. (People v. Terrill, 127 Cal. 99, (59 Pac. 836.) As stated, the facts of the case are practically identical with those involved in People v.

> Carroll, 1 Cal. App. 4, (81 Pac. 681), and upon the authority thereof, as well as for the reasons given, we are constrained to hold that the indictment is insufficient in that it *fails to charge defendant with the commission of a public offense.*"

In the case at bar, all of the facts alleged in the indictment may be true, yet petitioner not be guilty of a crime. The indictment merely alleges that petitioner (*a stranger to the bank*) subscribed and filed with the bank, a paper which was false * * * false not as to the financial condition *of the bank,* nor as to any matter affecting the bank, but false as to the financial affairs of appellant and various corporations in no wise connected with the bank—not even remotely, as depositors or customers. The indictment not only *fails* to show that the "paper" was false as to matters pertaining to the bank's affairs, but it goes further and shows affirmatively that the paper pertained and related *solely and exclusively* to the affairs of petitioner and various corporations. It is also to be noted that the indictment does not charge that appellant obtained, or sought to obtain, a loan, or credit, or other thing of value.

Under the rule in all jurisdictions including Washington (*State v. Hall, supra*), the indictment in the case at bar does not *charge a crime,* under Section 56 of the State Banking Act. This being true, one of the essentials required by Article IV, Section 2 of the U. S. Constitution as prerequisite to lawful arrest and detention for interstate rendition is absent, and appellant's arrest is illegal.

(B) Appellant is Not Charged With a Crime in the State of Washington Because the "False or Fictitious Paper or Security, Instrument or Paper" Denounced by Section 56 of the Washington State Banking Act Includes Only Such "Paper" as is False or Fictitious as to the Financial Condition of a Bank, or as to Matters Affecting the Financial Condition of a Bank, Whereas the Indictment Fails to Show that the "Paper" Therein Referred to in Anywise Related to the Financial Condition or Affairs of a Bank, But on the Contrary the Indictment Shows Affirmatively that the "Paper" in Question Pertains Solely and Exclusively to the Financial Condition and Affairs of Appellant and of Various Corporations Who Were in Nowise Connected With a Bank.

In construing and interpreting the act, and in determining the meaning of any particular word or section, resort must be had to the context of the whole act. That is the rule of construction applied in all jurisdictions. That the Washington Courts are in accord with all the other jurisdictions as to the rule, is conclusively shown in the case of *State v. Daniel,* 49 Pac. 243 (Wash.), where the Court (Supreme Court of Washington), at page 244 said:

> "Mr. Sutherland, in section 239, in speaking on this subject, says: 'The practical inquiry is, usually, what a particular provision, clause, or word means. To answer it one must proceed as he would with any other composition,—*construe it with reference to the leading idea or purpose of the whole instrument.* The whole and every part must be considered. The general intent should be kept in view in determining the scope and meaning of any part. This survey and comparison are necessary to ascertain the purpose of the act and to make all the parts harmonious. They are to be brought into accord, if practicable, and thus, if possible, give a sensible and intelligible effect to each in furtherance of the general design. A statute should be so construed as a

> whole, and its several parts, as most reasonably to accomplish the legislative purpose."

Applying the rule above quoted, Section 56 must be construed "with reference to the leading idea or purpose of the whole act," in order that we may determine exactly what "papers" are denounced by Section 56.

A reading of Section 56 discloses that there are three ways in which the "persons" referred to in the section may violate its provisions: (1) by making or causing a false entry in the bank's books; (2) by subscribing or exhibiting a false or fictitious paper, security or instrument, with intent to deceive a bank examiner, and (3) by making, stating or publishing a false statement as to the bank's assets or liabilities.

From a mere reading of the section and viewing the second provision in the light of the first and third provisions, it is apparent that the section is dealing exclusively with the books and papers of a bank, or at least with books and papers pertaining to the financial condition or affairs of the bank, as distinguished from books and papers having no bearing on the condition or affairs of the bank, as for instance the private books of account, or the financial statement of a stranger. Clearly the legislature did not intend to make a felon out of "every person who subscribes or exhibits *any* false paper, with intent to deceive a bank examiner." The legislature did not intend that I should go to prison for ten years in the event I should "subscribe or exhibit a false paper (a false statement as to my golf score, or as to my pro-

ficiency as a golfer) with intent to deceive Mr. Black, who happens to be a bank examiner." Nor did the legislature intend to make a felon out of a person who by letter or other writing addressed to Mr. Black, falsely represented his own personal financial worth. If, after considering Section 56 as a whole, any doubt remains as to the fact that the only "papers, securities and instruments" denounced by the section are those which are false or fictitious as to the financial condition or affairs *of a bank,* then the context of the whole act must be considered. We then find that the entire act, both in title and in substance, is devoted to the affairs of banks and trust companies. We also find that by the act itself (sections 5, 6 and 7) the inquiry of the bank examiners is *limited* strictly to the *financial condition and affairs of a bank. Section 5* requires that banks submit to the examiner, regular reports as to the banks' resources and liabilities, and also such special reports as the examiner shall call for.

Section 7 requires the examiner to visit each bank at least once a year for the purpose of making a full investigation into its affairs. The examiner may administer oaths to directors, officers, employees and agents of banks for the purpose of interrogating them orally as to the condition of the bank. The authority of the examiner is by the act limited strictly to investigating and determining *the financial condition of the bank.*

Inasmuch as the examiner is charged with the duty of examining and determining the financial condition

of a bank, it is reasonable to assume that the legislature intended to assist him in obtaining truthful and correct information from the bank's books, papers and employees as to the financial condition, or pertaining to the financial condition, of the bank.

It is equally reasonable to assume that the legislature did not intend to assist him in obtaining information as to matters outside the scope of his official duties and not pertaining to the financial condition or affairs of a bank, nor did the legislature intend to stamp and punish as a felon a bank officer or anyone else who by a writing or otherwise, intended to deceive, or did deceive, a bank examiner as to any matter having no bearing upon the financial condition of a bank. We think there is no room for even the slightest doubt but that unless the "paper, security or instrument" referred to in the second part of Section 56, is false as to the *financial condition of a bank,* or to matters directly bearing upon and affecting the *financial condition of a bank,* there is no violation of that portion of Section 56 (second portion) under which appellant in this case is sought to be charged.

If it is essential to a violation of Section 56 that the "paper" etc., be false as to the financial condition or affairs of a bank, then under the decisions cited and quoted at pages 16-28 of this brief, it is equally essential that an indictment seeking or attempting to charge an offense under its provisions *must* contain direct averments showing the paper to be false as to the *financial condition or affairs of the*

bank. If this indictment fails to contain a direct averment as to that essential element of the offense, the indictment *does not charge a crime.* (See authorities at pages 16-28 hereof.)

An examination of the indictment in the case at bar discloses that the indictment contains no allegation whatever, either by way of direct averment or otherwise, to the effect that the papers alleged to have been false, and alleged to have been "filed" by petitioner, in anywise, or in the slightest degree, reported or reflected or had any connection with, or bearing upon, the financial condition or affairs of any bank. On the contrary, however, the indictment shows affirmatively that the "papers" pertained solely and exclusively to the financial condition and affairs of persons *other* than a bank, to-wit: appellant and various lumber companies.

It follows of necessity, under the authorities hereinbefore cited and quoted, that the alleged indictment, failing in this particular to allege an essential element of the offense, it *does not charge a crime.* This being true appellant is not subject to arrest and interstate rendition, and the order of the District Court should be reversed.

Before passing from the point, and as further establishing that Section 56 of the Banking Act is limited in its application to officers, agents and employees of banks, and that it does not apply to persons not connected with banks, who make and file with a bank, statements which are false as to their own financial condition or affairs, we respectfully invite

the Court's attention to the fact that the Washington Legislature, by *Section 2620 Remington's Compiled Statutes of Washington,* has legislated upon that subject. Said Section 2620 is as follows:

> "Every person who, with intent thereby to obtain credit or financial rating, shall willfully make any false statement in writing of his assets or liabilities to any person with whom he may be either actually or prospectively engaged in any business transaction or to any commercial agency or other person engaged in the business of collecting or disseminating information concerning financial or commercial ratings, shall be guilty of a misdemeanor."

Section 2620 above set forth clearly covers the situation where a person not connected with a bank, makes and files a false financial statement with a bank. It is not consistent with the intelligence and purpose which we must attribute to the Legislature, to hold that that body after having enacted Section 2620 prohibiting certain acts, then proceeded to enact Section 56 of the Banking Act again prohibiting the same acts as were already denounced and prohibited by Section 2620.

We think that it is apparent that Section ~~2620~~ 56 of the Banking Act was not intended to, and does not, apply to appellant who was in no wise connected with any bank, and that appellant is not subject to a "charge" under that section.

(C) Appellant is Not Charged With a Crime in the State of Washington Because Section 56 of the Washington State Banking Act Under Which Appellant is Sought to be Charged is Invalid and Void, and is in Violation of and Obnoxious to the Provisions of Article II, Section 19, of the Constitution of the State of Washington.

In determining whether a state statute is in violation of the constitution of that state the Federal Courts will, where possible, follow the determination of the Supreme Court of the state as to the constitutionality or unconstitutionality of the act under the state constitution although the Federal Courts are not bound by the State Court's decision. However, in the case at bar the Courts of Washington have never passed upon the constitutionality or unconstitutionality of either the Washington State Banking Act as a whole, or Section 56 thereof. Inasmuch as the State of Washington has attempted to charge petitioner with a crime under that act and seeks to extradite him under the provisions of the Federal Constitution and laws for such alleged offense, it becomes necessary for this Federal Court to pass upon and determine whether the act or Section 56 thereof is valid and constitutional or is invalid and unconstitutional under the Washington State Constitution.

If, the Court holds as hereinbefore urged that the Washington State Banking Act, and Section 56 thereof apply only to a limited "Class" of persons, and that the "false papers" denounced by Section 56 of the act include only those papers which pertain to the financial condition of a bank, then we concede the constitutionality of the act under the Washington State Constitution.

But, if the Washington State Banking Act, and Section 56 thereof, applies to persons *other* than banks and bank personnel, then the act, or at least Section 56 thereof, is invalid and void and in violation of the Constitution of the State of Washington.

The provisions, prohibitions and penalties contined in Section 56 of the State Banking Act of Washington are limited in their application to banks and trust companies and can not be extended to the general public because:

(a) The Constitution of the State of Washington, Article II, Section 19, provides:

> "No bill shall embrace more than one subject and that shall be expressed in the title."

(b) The title to the State Banking Act is:

> "An Act relating to banking and trust business; the organization, regulation, management and dissolution of banks and trust companies, providing penalties and repealing certain acts and declaring an emergency."

(See Washington Laws 1917, page 271.)

(c) The context of the entire act shows the intention of the legislature that its provisions shall apply only to banks and trust companies, including their officers, agents and employees and such other persons (as bank examiners) as are necessary for the conduct, operation and regulation of banks and trust companies.

(d) If, however, the act regulates the conduct of persons not necessary to the organization, operation, regulation or dissolution of banks, to-wit: the

general public, then the act or bill embraces more than one subject, to-wit: it embraces the subject of the regulation of banks and trust companies and it *also* embraces the subject of the regulation of persons in nowise connected with the organization, regulation, operation or dissolution of such companies. The bill would then embrace more than one subject as well as subject matter not expressed in the title, and all portions of the bill sought to be applied to persons other than banks and trust companies, including the personnel necessary to the organization, operation, regulation and dissolution of the same, would be in violation of Article II, Section 19, of the Washington State Constitution and void. This would be true even though the provision in the bill very definitely *sought* to include and embrace within its provisions persons who were members of the general public and in nowise connected with the organization, etc. of the bank or trust company.

In determining the intent of the Washington legislature in passing the State Banking Act we must assume that the legislature intended to act in conformity with the State Constitution. The legislature knew that it could not, even if it desired, embrace more than one subject in the bill, to-wit: the subject of the regulation of banks and trust companies. The legislature could not, even if it desired, embrace within the bill provisions regulating the conduct of any person, other than banks, trust companies and their officers, agents and employees and such state officials as are necessary for the regulation thereof.

Aside, however, from the actual lack of power of the legislature to include more than one subject in the bill, the bill in question, the State Banking Act, must be so construed as to uphold its constitutionality if possible. In order to uphold its constitutionality the Court must hold that it embraces but one subject, to-wit: the regulation of banks and trust companies, which by necessary implication would include the personnel necessary to the organization, operation, regulation, etc., of the same. If the bill in question (Washington State Banking Act), was intended to regulate the conduct of persons, other than banks, trust companies and such personnel as is necessary to the organization, operation and regulation thereof, that is to say, if the legislature intended to regulate the conduct of private individuals, forming no part of the banking personnel, then the act or so much thereof as is sought to be applied to such private individual is unconstitutional and void.

The act in question is an "act relating to banking and trust business." That is the title of the act. Under the Washington Constitution, Article II, Section 19, no bill can embrace more than one subject and that subject must be expressed in the title. California has a similar provision in its Constitution, Article IV, Section 24, and California has construed that provision.

In the case of *Wiliams v. Carver,* 171 Cal. 659, the superintendent of banks brought an equitable action to recover from the stockholders of the Kern Bank

upon their constitutional liability to creditors. A demurrer was interposed. Held:

> "Plaintiff asserts right to maintain the suit under and by virtue of an act entitled 'an act to define and regulate the business of banking' which is in part as follows: 'The superintendent of banks shall collect all debts due and claims belonging to it, and may * * * enforce individual liability of the stockholders by action to be brought within three years after the date of his taking possession of the affairs of such bank.' "

The subject of the legislation, as expressed in its title is "the business of banking." The constitutional liability of the stockholders to the creditors is distinct and separate from the business of banking. The Court held here that the superintendent of banks could not enforce the stockholders' liability against the stockholders as that was not the *business of banking* and was not expressed within the title. The Court said:

> "Moreover, if the provision be construed as authorizing the superintendent of banks to enforce the constitutional liability of stockholders to the creditors, then it is void as being obnoxious to the provision of section 24, article IV, of the constitution, which provides that every act shall embrace but one subject, which shall be expressed in its title. As stated, the subject of the legislation as shown by its title, is to 'define and regulate the business of banking.' "

In the case at bar the conduct or acts or omissions of persons, members of the general public, and not personnel of banks and trust companies, is certainly no part of the business of banking and, consequently,

if Section 56 was intended to apply to the general public as distinguished from bank personnel, etc., it is void because obnoxious to the provisions of the Washington constitution.

In other words, the conduct of members of the general public is no part of the *business of banking.*

In the case of *State v. Clark,* 86 Pac. 1067 (Wash.), an information was filed for violation of Section 1 of the provisions of an act entitled: "An Act for the Protection of Builders and Declaring an Emergency." Section 1 reads as follows:

> "Section 1. That any person, firm or corporation contracting with another to supply labor or material for any purpose whatever, who shall fraudulently represent that the labor or material supplied has been paid for, and shall, upon such fraudulent representation, collect the price thereof, shall be deemed guilty of a felony, and upon conviction thereof, shall be fined in any sum not exceeding one thousand dollars, or imprisoned in the penitentiary for any term not exceeding two years, or both."

The Court held the information to be insufficient and the act void because it did not show with sufficient clearness who were to be protected by the act; the term "builders" being one of such elastic application that it might include owners as well as contractors, independent contractors, or even other persons.

In the case at bar the State Banking Act, and Section 56 thereof, is equally indefinite as to the "persons" who are subject to its prohibitions and penalties. If it be held that Section 56 applies only to banks and banking personnel, then it does not embrace

subject matter not indicated by its title and the act is valid; *but* appellant herein not being connected with any bank is not subject to its penalties and cannot be charged with violating the act. If, however, it be held that the words "every person" in said section apply not only to banks and banking personnel, but also to *all other persons* even though in no wise connected with a bank (as appellant), then the act is unconstitutional and void

(1st) because it contains subject matter not expressed in the title of the act; and

(2nd) because the bill pertains to more than one subject.

The State Banking Act under consideration in this case was adopted in 1917. Many of the provisions were newly written at that time. Section 56, however, was substantially carried over from the earlier law. That section was formerly Section 53 of the Bank Act of 1907 (Remington's 1915 Codes and Statutes of Washington, Section 3314). No cases have been reported under the act of 1917. However, the case of *State v. Pierson,* 172 Pac. 237, reports a prosecution under Section 53 of the act of 1907, which was subsequently carried into the 1917 act as Section 56, that being the section under which the prosecution in the case at bar is brought. In the *State v. Pierson* case the defendant was an officer of the bank and consequently the question as to whether the act was limited to banks and banking personnel or whether it extended to persons in nowise connected with the bank, was not raised; however, the court in the *Pierson* case stated:

> "A case strikingly like this was before the Supreme Court of the State of New Jersey in State v. Twining, 63 Atlantic 402."

In the *State v. Twining* case we find that New Jersey had a bank act, the title of which was "an act concerning trust companies." The section in question was practically identical with Section 56 of the Washington act, excepting that the New Jersey section was specifically limited to "every director, officer, agent or clerk of any trust company" who subscribed or made false statements with intent to deceive a bank examiner, whereas the corresponding section of the Washington Act (Section 56) provides "every person" who subscribes or makes false statements with intent to deceive a bank examiner shall be guilty, etc.

In the New Jersey case it was contended that the section of the act under which the indictment was found was unconstitutional in that it contained subject matter which was not embraced in the title of the act. The Supreme Court of New Jersey sustained the constitutionality of the act upon the ground, and solely upon the ground, that the act was *limited* in its application to "directors, officers, agents or clerks" of the trust company. It is very clear from the opinion of the Court in *State v. Twining* that had the New Jersey section not been *limited* in its application to bank *personnel*, it would have been declared unconstitutional and void.

If the penal provisions of Section 56 of the Washington State Banking Act are limited to the acts of officers, agents, employees, etc. of banks, then that act contains but one subject and the provision is valid,

but it has no application to appellant who was not a person subject to its provisions. If, however, it is sought to extend the penal provisions of Section 56 to apply to appellant and other persons forming no part of the personnel of a bank, then Section 56 is unconstitutional and void.

A void act, being no law at all, it would be a legal impossibility to charge appellant with a crime thereunder. As hereinbefore mentioned, unless appellant has been charged with a crime in the State of Washington, his arrest and detention for interstate rendition is in violation of the provisions of the Federal Constitution and statutes relating to interstate extradition.

(D) Appellant is Not Charged With a Crime in the State of Washington Because Section 56 of the Washington State Banking Act Under Which Appellant is Sought to be Charged is Invalid and Void and is in Violation of and is Obnoxious to the Provisions of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment of the Constitution of the United States provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*"

Heretofore it has been shown that there can be no violation of the second portion of Section 56 of the Washington State Banking Act unless a bank officer, employee or other person within the *"class,"* subscribed or exhibited with intent to deceive a bank

examiner, a paper which was false *as to the financial conditions and affairs of a bank.* If this Court's interpretation and construction of said section is in accord with appellant's contentions then, obviously, inasmuch as appellant is not a member of the "class" and the indictment contains no averment that he is a member of the "class" and the "paper" described in the indictment not pertaining *to the financial conditions and affairs of a bank,* and that matter appearing affirmatively upon the face of the indictment, then appellant is not *charged with a crime* under the laws of Washington and the writ of habeas corpus should have issued and the order of the District Court should be reversed.

In order that petitioner be *charged with a crime* under Section 56 of the Banking Act it is necessary that a *literal construction* be given to the section, as urged by appellees.

Appellees contend:

1. That Section 56 is not limited in its application to members of any "class," but that its prohibitions and penalties extend to every person in the United States, regardless of whether he be an officer, agent, director, employee, or otherwise connected with a bank; and

2. That it is not essential that the "false paper" denounced by Section 56 be false *as to the financial condition or affairs of a bank,* but it is sufficient if the "paper" be false as to any matter, as for example: if it be false as to the financial condition of a person or corporation not within the "class" and in no wise connected with a bank, and who is not sub-

ject to an examination, or inspection by a bank examiner.

As before stated, unless Section 56 be *literally construed* as sought by appellees this appellant is not *charged with a crime* and the order of the District Court must be reversed.

If, however, Section 56 be given the *literal* construction sought by appellees then it becomes in violation of the Fourteenth Amendment of the Constitution of the United States for the following reasons:

If the provisions of Section 56 prohibit the subscribing or exhibiting of *any* false "paper" with intent to deceive a bank examiner, and if its prohibition is not confined to "papers" which are false as to matters which an examiner, in his official capacity, is by law obliged or authorized to investigate, to wit: the financial condition of a bank, then under those circumstances and under that construction every person who writes a letter containing any false statement to Mr. Black, a person who earns his livelihood by examining banks under the direction of the State Bank Examiner, will be guilty of a felony and be subject to a long term of imprisonment even though the letter be false only as to the personal private affairs of the writer and sender. Under that construction any person who is untruthful (in writing) about any matter whatsoever, to a person who happens to be a bank examiner, regardless of the character or nature of the false statement, will fall under the penalty of Section 56 and be punishable as a felon. Under that construction Section 56 operates to penalize every person who lies (in writing) to any other person who

happens to be a bank examiner, regardless of the nature or subject matter of the lie. It throws a protection around individuals who happen to gain their livelihood by examining banks, which it does not afford and accord to other persons, and as such the section becomes class legislation and is obnoxious to the provisions of the Fourteenth Amendment to the Constitution of the United States. A literal construction of Section 56 of the act will deny to persons working as butchers, bakers and brokers, and even to judges and other high public officials, the protection which it accords to those individuals who gain their livelihood by examining banks. It would be exactly the type of class legislation which the Fourteenth Amendment was intended to destroy and prevent.

In construing an act, or a section of an act, or a word or words, they must be interpreted or construed, if fairly possible, to sustain, rather than destroy, the constitutionality of the act or section.

Section 56 if construed *literally* is obnoxious to both the Washington State Constitution and the Federal Constitution. If, however, Section 56 be construed reasonably, and as appellant contends it must be construed, and as the legislature clearly intended it, then Section 56 is valid.

This Court in construing Section 56 to apply only to a "class" and in holding that the "false papers" denounced by Section 56 include only those "papers" which are false as to the financial condition or affairs of a bank, will uphold the validity and constitution-

ality of the section under both the Washington State Constitution and the Federal Constitution, while a contrary or different construction (literal) will invalidate the section under both of those Constitutions.

CONCLUSION.

Appellant is not subject to arrest and detention for interstate rendition to the State of Washington unless he is substantially charged with a crime in that state.

Appellant has not been charged, either substantially or at all, with any crime in the State of Washington. The document which was presented to the Governor of the State of California by the authorities of Washington, and which constitutes the basis of the executive or rendition warrant under which appellant is being detained and held and which is entitled "Indictment," alleges that in January, 1927, more than three years ago, appellant did certain things and acts in the State of Washington in alleged violation of the Washington Banking Act. *But* the acts therein alleged do not constitute a violation of the Washington Banking Act.

If it be held that the Washington Banking Act applies to persons other than bankers and bank examiners, and that it applies to "all persons" including persons (as appellant) who are in no wise connected with a bank, and who are strangers to the bank, then it is void under the Washington Constitution, because,

(1) The body of the act is broader in scope than is reflected in the title of the act; and

(2) The act contains more than one subject, viz.: (a) The regulation of the conduct and affairs of banks, bankers and bank examiners, and

(b) The regulation of the conduct and affairs of persons not within the banker "class."

If it be held that Section 56 of the Act is to be construed in accordance with its obvious and true meaning, then it does not apply to appellant and he cannot be "charged" thereunder; *But* if, as urged by the appellees, Section 56 of the Act is to be construed *literally,* then the act is in violation of the Fourteenth Amendment of the Constitution of the United States and is void. A void act being no law at all, and neither appellant nor any other person can be "charged" thereunder.

The Washington Banking Act is in the usual form of state banking acts; it applies only to banks, bankers and bank examiners and it does not apply to persons (as appellant) who are in nowise connected with any bank.

It is an essential element of the crime defined by Section 56 of said act that the accused be a member of the banker "class"; the alleged indictment failing as it does to allege that appellant was a member of the "class," it fails to allege an essential element of the crime defined by the section.

The "papers" denounced by said Section 56, include only such papers as falsely reflect the financial condition or affairs of a bank. The pretended in-

dictment shows upon its face, affirmatively, that the "papers" therein referred to do not pertain to the financial condition and affairs of a bank, but on the contrary they refer only to the private affairs of appellant who was a total stranger to the bank.

Appellant respectfully urges that the order and decision of the Honorable District Court be reversed, that the said executive warrant be declared void, and that appellant be released and liberated from the restraint now being imposed by appellees.

Dated, San Francisco,
February 26, 1930.

Respectfully submitted,
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